No. 17-1307

In The
Supreme Court of the United States

DENNIS OBDUSKEY,

Petitioner,

v.

McCARTHY & HOLTHUS, LLP, *ET AL.*,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

BRIEF OF NATIONAL CREDITORS BAR ASSOCIATION AS AMICUS CURIAE IN SUPPORT OF RESPONDENT

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INTEREST OF AMICUS CURIAE

The National Creditors Bar Association™ ("NCBA") is a nationwide, not-for-profit bar association of attorneys who represent creditors in all areas of creditors rights law.[1] Its members include over 500 law firms, all of whom must meet association standards designed to ensure experience and professionalism. Members are also guided by the NCBA's code of ethics, which imposes an obligation of self-discipline beyond the requirements of applicable laws, regulations, professional codes and rules of professional conduct.[2]

Members of the NCBA are regularly involved in the lawful collection of past-due consumer debts. For this reason, NCBA members must interpret and comply with the often-unsettled requirements of applicable federal law, principally the Fair Debt Collection Practices Act ("FDCPA" or "Act"), Pub. L. No. 95-109, 91 Stat. 874 (1977). Members of the NCBA have a strong interest in ensuring that the Act is interpreted and applied in a way that allows collection attorneys to execute their ethical duty to advance their clients' legitimate interests – within the bounds of existing law – without constantly exposing themselves to substantial

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[1] No counsel for a party authored this brief in whole or in part, and no such counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than the amicus curiae or its counsel made a monetary contribution to the preparation or submission of this brief. Consent to the filing of this brief by the parties was filed on August 8, 2018 and on September 4, 2018.

[2] The NCBA was formerly known as the National Association of Retail Collection Attorneys ("NARCA").

personal liability. The NCBA has participated as amicus curiae in other cases involving the interpretation or application of the Act. *See, e.g.*, *Marx v. General Revenue Corp.*, 568 U.S. 2 (2013); *Jerman v. Carlisle, McNellie, Rini, Kramer & Ulrich LPA*, 559 U.S. 573 (2010); *Heintz v. Jenkins*, 514 U.S. 291 (1995); *Guerrero v. RJM Acquisitions LLC*, 499 F.3d 926 (9th Cir. 2007).

The NCBA is the only national bar association dedicated solely to the needs of collection attorneys. A reversal of the Tenth Circuit's ruling would erroneously and unfairly expose the attorney and law firm members of the NCBA, and many creditor clients of those members, to individual and class action claims under the FDCPA. The NCBA thus has a direct interest in this litigation, and it has authorized the filing of this brief.[3]

SUMMARY OF ARGUMENT

The NCBA urges this Court to affirm the Tenth Circuit's opinion. In doing so, the NCBA asks this Court to adopt the reasoning of the circuit courts that have held that a communication does not constitute "debt collection" under the FDCPA unless it seeks

[3] NCBA does not take the position that the FDCPA can never apply to its members. Rather, NCBA submits this brief asking the Court to clarify that foreclosure activity should not be considered "debt collection" under the FDCPA if it is not seeking payment of money from a consumer.

money from a consumer. This will allow the Court to create a bright line rule and provide critical guidance to NCBA attorneys and other collectors who seek to comply with the FDCPA each day.

Interpreting the FDCPA in the manner urged by the NCBA is consistent with the federalism concerns this Court expressed in *Sheriff v. Gillie*, 136 S. Ct. 1594 (2016). There, the Court observed that the FDCPA, like any federal statute, should not be interpreted in a manner that interferes with state law on a matter essential to a state's interests, unless Congress clearly intended to displace that law. The regulation of foreclosures is clearly a matter of essential state concern and grafting the requirements of the FDCPA on top of the foreclosure procedures enacted by the states creates numerous unintended conflicts, thereby improperly placing attorneys and their creditor clients at risk. There is no indication that Congress intended to displace state foreclosure laws when it enacted the FDCPA.

Finally, a ruling from this Court affirming the Tenth Circuit will help put an end to the "cottage industry" of FDCPA litigation filed by consumer attorneys against lawyers who represent secured creditors. Attorneys who are ethically representing their clients' interests by following state law procedures, like the members of the NCBA, should not have to face the chilling effect of strict liability under a federal statute, statutory penalties, and exposure to attorney's fee awards. The FDCPA can and should be read

consistently with state foreclosure laws. The ruling of the Tenth Circuit should be affirmed.

ARGUMENT

When Affirming The Decision Of The Tenth Circuit, This Court Should Clarify That A Collector's Communication Is Not "Debt Collection" Subject To The FDCPA Unless It Seeks Money From A Consumer

Although the FDCPA prohibits debt collectors from engaging in a broad range of unfair and misleading debt collection practices, *see* 15 U.S.C. §§ 1692b-1692h, the statute does not define the term "debt collection," *see id.* at § 1692(a) (referring to "abundant evidence of" improper "debt collection practices" and observing that certain "debt collection practices" can cause undesired effects); *id.* at § 1692a (defining certain terms, but not defining "debt collection"). The circuit courts have reached different conclusions about whether foreclosure activity is, or is not, "debt collection," thereby complicating the compliance obligations of the NCBA's members and other practitioners. *See, e.g.*, *Glazer v. Chase Home Fin. LLC*, 704 F.3d 453, 460 (6th Cir. 2013) ("Unfortunately, the FDCPA does not define 'debt collection,' and its definition of 'debt collector' sheds little light, for it speaks in terms of debt collection.") (citations omitted); *Gburek v. Litton Loan Serv. LP*, 614 F.3d 380, 384 (7th Cir. 2010) ("Neither this circuit nor any other has established a bright-line rule for determining whether a communication from a debt collector

was made in connection with the collection of any debt.").

The Ninth Circuit, and the Tenth Circuit in this case, have correctly held that an entity is not a "debt collector" engaged in "debt collection" under the FDCPA unless the challenged communication sought to obtain money from a consumer. *See Ho v. ReconTrust Co. NA*, 858 F.3d 568, 571-74 (9th Cir. 2017) (mailing debtor notice of default and notice of sale, which threatened foreclosure, was not attempt to collect money from debtor, and thus was not "debt collection" under FDCPA; "The notices at issue in our case didn't request payment from Ho."); *Obduskey v. Wells Fargo*, 879 F.3d 1216, 1221 (10th Cir.) (following *Ho*; "Because enforcing a security interest is not an attempt to collect money from the debtor, and the consumer has no 'obligation . . . to pay money,' non-judicial foreclosure is not covered under FDCPA") (citations omitted), *cert. granted*, 138 S. Ct. 2710 (2018).[4]

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[4] *But see McNair v. Maxwell & Morgan PC*, 893 F.3d 680, 683-84 (9th Cir. 2018) (*praecipe* and writ of special execution filed with clerk of court violated FDCPA, despite fact that they were never served on plaintiff and did not make demand for payment of money); *Mashiri v. Epsten Grinnell & Howell*, 845 F.3d 984, 989 (9th Cir. 2017) (law firm's notice advising that "failure to pay your assessment" would result in recording of lien was demand for payment of money subject to FDCPA). Other circuits have held that a communication may constitute "debt collection" under the FDCPA, even where there is no attempt to obtain payment of money from the consumer. *See McCray v. Federal Home Loan Mortg. Corp.*, 839 F.3d 354, 360 (4th Cir. 2016) ("nothing in [the] language [of the FDCPA] *requires* that a debt collector's misrepresentation [or other violative acts] be made as part of an *express demand for*

The decision of the Tenth Circuit should be affirmed. The NCBA urges the Court to clarify that communications that do not seek money from the debtor are not subject to the FDCPA. It should not matter whether a communication is made in connection with non-judicial foreclosure proceedings, or judicial foreclosure proceedings, or in some other context. Nor should it matter if the communication is made by a lawyer or other entity that does, or does not, fit the general definition of a "debt collector" under the FDCPA. If there is no attempt to get the debtor's money, the Act should not apply.

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payment or even as part of an action designed to induce the debtor to pay.") (emphasis in original, citation omitted); *Glazer*, 704 F.3d at 461 (FDCPA applied to judicial foreclosure complaint, despite absence of any allegation that it made demand for payment of money on debtor: "Thus, if the purpose of an activity taken in relation to a debt is to 'obtain payment' of the debt, the activity is properly considered debt collection."); *Gburek*, 614 F.3d at 386 (letter offering to discuss "foreclosure alternatives" was attempt to collect debt: "Though it did not explicitly ask for payment, it was an offer to discuss Gburek's repayment options, which qualifies as a communication in connection with an attempt to collect a debt."); *Kaltenbach v. Richards*, 464 F.3d 524, 526-28 (5th Cir. 2006) (attorney who filed foreclosure action may be "debt collector" under FDCPA, despite absence of any allegation that attorney made demand for payment of money).

The Federalism Concerns This Court Expressed In *Sheriff v. Gillie* Counsel In Favor Of Affirming The Decision Of The Tenth Circuit

In *Sheriff v. Gillie*, the Court observed that the FDCPA should not be interpreted in a manner that interferes with state law, unless Congress clearly intended to displace that law. *See* 136 S. Ct. 1594, 1602 (2016).[5] The reasoning employed by the Court in *Gillie* applies here as well.

At issue in *Gillie* was whether a law firm retained by the Ohio Attorney General had used a false or misleading letterhead when collecting debts owed to the State. *See Gillie*, 136 S. Ct. at 1600-02. The Attorney General had appointed the firm as "special counsel" for the State pursuant to Ohio law, and had required the firm to use the Attorney General's letterhead. *Id.* In a unanimous opinion, the Court held the firm's use of the Attorney General's letterhead was *not* false or misleading under the Act. *Id.* at 1598, 1600-02.[6] In doing so,

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[5] *See also Bates v. Dow Agrosciences LLC*, 544 U.S. 431, 449 (2005) ("[i]n areas of traditional state regulation . . . a federal statute has not supplanted a state law unless Congress has made such an intention 'clear and manifest' "); *BFP v. Resolution Trust Corp.*, 511 U.S. 531, 544 (1994) ("To displace traditional state regulation in such a manner, the federal statutory purposes must be 'clear and manifest.' ").

[6] Specifically, this Court held that "use of the letterhead accurately convey[ed] that special counsel, in seeking to collect debts owed to the State, d[id] so on behalf of, and as instructed by, the Attorney General." *Id.* at 1598.

the Court recognized the "federalism concern" that a contrary result would create:

> Ohio's enforcement of its civil code – by collecting money owed to it – [is] a core sovereign function. [citation omitted]. Ohio's Attorney General has chosen to appoint special counsel to assist him in fulfilling this obligation to collect the State's debts, and he has instructed his appointees to use his letterhead when acting on his behalf. There is no cause, in this case, to construe federal law in a manner that interferes with States' arrangements for conducting their own governments.

Id.

The present case presents a far more compelling "federalism concern" than the one at play in *Gillie*. It cannot be seriously disputed that the regulation of foreclosure activity (be it judicial or non-judicial) is a "core sovereign function" of the states. *See* Respondent's Brief at pp. 39-41.[7] Indeed, this Court has recognized the "essential state interest" states have in regulating the enforcement of security interests in property:

> It is beyond question that an essential state interest is at issue here: We have said that 'the general welfare of society is involved in the security of the titles to real estate' and the power to ensure that security 'inheres in the

[7] Petitioner does not dispute this point in any coherent way and in fact assumes that foreclosure is a "traditional state interest." *See* Petitioner's Brief at p. 26.

> very nature of [state] government.' [citation, brackets in original]. Nor is there any doubt that the interpretation urged by petitioner would have a profound effect upon that interest: The title of every piece of realty purchased at foreclosure would be under a federally created cloud.

BFP, 511 U.S. at 544 (refusing to interpret Bankruptcy Code in manner that would disrupt state foreclosure schemes); *see also Ho*, 858 F.3d at 576 ("When one interpretation of an ambiguous federal statute would create a conflict with state foreclosure law and another interpretation would not, respect for our federal system counsels in favor of the latter."); *Mahmoud v. De Moss Owners Assoc. Inc.*, 865 F.3d 322, 334 (5th Cir. 2017) ("To construe §§ 1692e and f the way Mahmoud and Jackson request would interfere with Texas's carefully articulated arrangements for conducting nonjudicial real property foreclosures by creating causes of action where state law finds no wrongful foreclosure.").

Here, as in *Gillie*, interpreting the FDCPA in the manner urged by Petitioner will substantially interfere with the operation of state law on a matter of essential state interest. *See* Respondent's Brief at pp. 42-44. Unlike *Gillie*, however, the disruption will not be limited to Ohio; rather, it will affect the foreclosure schemes of nearly every state, and it will impact

attorneys in nearly every state, such as NCBA members, that practice in the foreclosure area.[8]

Actual and potential conflicts between the FDCPA and state foreclosure laws abound. For example, states frequently require that notice of a foreclosure sale be published in newspapers or other public media prior to sale. *See, e.g.*, Mich. Comp. Laws Ann. § 600.3208; Cal. Civ. Code § 2924f(b)(2); N.C. Gen. Stat. § 45-21.17(1)-(2); R.I. Gen. Laws § 34-27-4(a); Wash. Rev. Code § 61.24.040(5); Alaska Stat. § 34.20.080(a); Or. Rev. Stat. § 86.774(2)(a). These state statutes also frequently require that notice of the foreclosure be sent directly to various third parties. *See, e.g.*, Cal. Civ. Code § 2924b(c)(1)-(2); Wash. Rev. Code § 61.24.040(1)(b); N.C. Gen. Stat. §§ 45-21.16(b), 45-21.17(4); Alaska

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[8] Petitioner contends that "[i]t makes little sense to permanently construe a federal statute . . . to avoid a conflict with a handful of Colorado regulations that could change at any time." Petitioner's Brief at p. 28. This argument ignores *Gillie*, where the Court refused to construe the FDCPA in a manner that would conflict with the law of a single state (Ohio). *See Gillie*, 136 S. Ct. at 1600-02. Regardless, as discussed by Respondent and herein, the Court should not construe the FDCPA in a manner that would conflict with the carefully-crafted foreclosure laws of numerous states (not just Colorado's), which govern an area that is indisputably a core state concern. *See* https://www.realtytrac.com/real-estate-guides/foreclosure-laws/ (thirty-one states permit non-judicial foreclosure) (last visited Nov. 7, 2018) ("realtytrac"); *see also* Andra C. Ghent & Marianna Kudlyak, *Recourse and Residential Mortgage Default: Theory and Evidence from U.S. States*, Federal Reserve Bank of Richmond Working Paper No. 09-10R, 32 (Table 1), 44-55 (Appendix A) (June 10, 2010), *available at* https://www.richmondfed.org/~/media/richmondfedorg/publications/research/working_papers/2009/pdf/wp09-10r/pdf (summarizing state foreclosure laws) ("Ghent & Kudlyak").

Stat. § 34.20.070(c). The FDCPA, however, prohibits collectors from communicating with any third parties "in connection with the collection of any debt" except in narrow circumstances not applicable here. 15 U.S.C. § 1692c(b).[9]

Similarly, many states require that certain foreclosure notices be provided directly to debtors, even if they are represented by counsel. *See, e.g.*, N.C. Gen. Stat. § 45-21.16(a); Or. Rev. Stat. § 86.774(1)(a); Wash. Rev. Code § 61.24.030(8); Mich. Comp. Laws Ann. § 600.3208. The FDCPA, however, prohibits collectors from communicating with debtors who are represented by counsel "in connection with the collection of any debt" except in very narrow circumstances, none of which apply here. 15 U.S.C. § 1692c(a)(2).

Petitioner has not pointed to anything showing a "clear and manifest" intent of Congress in passing the FDCPA to "displace" state foreclosure laws. *See BFP*, 511 U.S. at 544. Instead, Petitioner contends this disruption is permissible. *See* Petitioner's Brief at pp. 26-28. Although Respondent has more than sufficiently

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[9] Some conflicts exist with state laws regulating judicial foreclosure. For example, in North Dakota, before a foreclosure action is initiated in court, a notice of foreclosure must be served on the owner of the property. *See* N.D. Cent. Code § 32-19-20. If the foreclosing entity (or its counsel) are unable to serve the notice personally or by mail, the notice is served by publication. *See Farm Credit Bank of St. Paul v. Obrigewitch*, 462 N.W.2d 113, 114 (N.D. 1990). Judicial foreclosure remains the sole mechanism of foreclosing on real property in the nineteen states that do not permit non-judicial foreclosure. *See* realtytrac (eighteen states permit judicial foreclosure only); *see also* Ghent & Kudlyak at 32 (Table 1), 44-55 (Appendix A).

addressed these arguments, the NCBA believes that one merits further discussion.

Petitioner contends that the "venue provision" of the FDCPA (section 1692i) covers foreclosures. *See* Petitioner's Brief at p. 26 (emphasis in original).[10] Petitioner ignores the plain language of the statute, because section 1692i clearly does not apply to non-judicial foreclosure proceedings, as they are not "legal actions."

Nor does section 1692i "cover" all judicial foreclosure actions. To the contrary, section 1692i(a) applies only to those "legal action[s]" that are filed "*on a debt*" and that are also "*against any consumer.*" 15 U.S.C. § 1692i(a) (emphasis added). A judicial foreclosure action that seeks *only* to foreclose on an interest in property, and does not seek money from the consumer, is neither an action "on a debt," nor is it an action "against a consumer." To the contrary, it is an *in rem* action against the property. *Cf. Cohen v. Rosicki, Rosicki & Assocs. PC*, 897 F.3d 75, 84 (2d Cir. 2018) (FDCPA applied to foreclosure complaint despite fact that "a mortgage foreclosure action is an *in rem* action in equity rather than an *in personam* action at law.").[11]

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[10] His contention that "[a]ll sides further agree that the FDCPA covers *judicial* foreclosures" misstates Respondent's position as stated in its brief. *Id.*

[11] In an analogous context, courts have repeatedly held that a garnishment action is not an action "against" a consumer within the meaning of section 1692i, as it is an action against the garnishee (generally, the consumer's employer). *See, e.g., Ray v. McCullough Payne & Haan LLC*, 838 F.3d 1107, 1111 (11th Cir. 2016); *Jackson v. Blitt & Gaines PC*, 833 F.3d 860, 864 (7th Cir.

Thus, contrary to Petitioner's argument, nothing in the language of section 1692i suggests that Congress intended the venue provision to apply to foreclosure activity (be it judicial or non-judicial) that seeks *only* to enforce security interests in property.

In addition, although *Ho* involved non-judicial foreclosure, the NCBA submits that its logic and reasoning should also apply in the context of judicial foreclosure if the foreclosing party seeks only to enforce its security interest and does not seek to recover money from the property owner. *See Ho*, 858 F.3d at 571-72; *see also, e.g.*, *Baylon v. Wells Fargo Bank NA*, 2015 WL 11111348, at *7-8 (D.N.M. Oct. 30, 2015) (judicial foreclosure action seeking only to enforce security interest, and not seeking deficiency judgment, did not constitute "debt collection" under FDCPA); *Doughty v. Holder*, 2014 WL 220832, at *3-5 (E.D. Wash. Jan. 21, 2014) (distinguishing between "deficiency judgment" and "foreclosure judgment," explaining that latter "is for the purpose of enforcing the creditor's security interest through a foreclosure," while former "is not for the purpose of enforcing the security interest, but for seeking payment of funds. . . . It is an action to collect a debt[,]" concluding that "[s]o long as the foreclosure proceedings, be they non-judicial or judicial, involve no more than mere enforcement of security interests, the

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2016); *Hageman v. Barton*, 817 F.3d 611, 617-18 (8th Cir. 2016); *Smith v. Solomon & Solomon PC*, 714 F.3d 73, 74-76 (1st Cir. 2013); *Randall v. Maxwell & Morgan PC*, 321 F. Supp. 3d 978, 981-984 (D. Ariz. 2018); *Muhammad v. Reese Law Group*, 2017 WL 4557194, at *7 (S.D. Cal. Oct. 12, 2017).

FDCPA does not apply[,]" and holding that "judicial foreclosure complaints filed by [defendants] sought only to enforce security interests via obtainment of a foreclosure judgment to be followed by a foreclosure sale" and thus were not subject to FDCPA). In other words, the substance of the action, not the form, is what matters.

As in *Gillie*, this Court should refuse to interpret the FDCPA in a manner that would displace carefully-crafted state foreclosure laws. Petitioner all but concedes this disruption will occur if his argument is adopted. The same "federalism concern[s]" apply to both judicial and non-judicial foreclosure. Both methods of foreclosure seek to enforce a secured interest in property; they do not seek payment of money from the debtor. As a result, this Court should hold that the FDCPA does not apply, regardless of which method is employed, so long as no demand for payment of money is made upon the debtor.

Affirming The Decision Of The Tenth Circuit Will Help Put An End To The Troubling Trend Of Consumer Attorneys Suing NCBA Members Simply For Complying With State Foreclosure Law

NCBA members (*i.e.*, licensed attorneys) who pursue foreclosure remedies on behalf of their creditor clients are faced with a Hobson's choice: 1) they can comply strictly with state foreclosure laws, putting themselves (and possibly their clients) at risk of being

sued under the FDCPA, or 2) they can seek to avoid FDCPA exposure by failing to strictly comply with state foreclosure laws, thereby putting their clients' security rights at risk (and themselves at risk for not vigorously pursuing their client's interest). NCBA members should not be forced to choose between complying with state law and their ethical obligation of zealous advocacy or with the FDCPA. This Court should put an end to this untenable situation by affirming the decision of the Tenth Circuit.

Consumer attorneys representing consumers routinely file lawsuits that seek to capitalize on direct conflicts between state foreclosure law and the FDCPA. *See, e.g.*, *Cohen*, 897 F.3d at 86 (rejecting FDCPA claim where foreclosure notices were not materially misleading and correctly identified name of creditor consistent with requirements of New York foreclosure statute); *Salewske v. Trott & Trott PC*, 2017 WL 2888998, at **2-8 (E.D. Mich. July 7, 2017) (allowing FDCPA claims based on notice of foreclosure sale required by state law to proceed); *McDermott v. Marcus, Errico, Emmer & Brooks PC*, 911 F. Supp. 2d 1, 71 (D. Mass. Nov. 20, 2012) (rejecting defendant's argument that sending notice to mortgagee as required by Massachusetts law was permissible under § 1692c(b) of the FDCPA: "the requirements of a state statute do not constitute the prior consent of a debtor given directly to a debt collector."); *Warran v. Smith Debnam Narron Drake Saintsing & Myers LLP*, 2011 WL 10858230, at *4 (E.D.N.C. Apr. 19, 2011) (rejecting claim that letter

violated North Carolina's foreclosure statute and therefore violated FDCPA).

In *Jerman v. Carlisle, McNellie, Rini, Kramer & Ulrich LPA*, the Court held that the bona fide error defense under the FDCPA does not apply to a violation resulting from a collector's mistaken interpretation of the legal requirements of the Act. *See* 559 U.S. at 604-05. The dissent explained that the Court's holding

> gives new impetus to the already troubling dynamic of allowing certain actors in the system to spin even good-faith, technical violations of federal law into lucrative litigation, if not for themselves then for the attorneys who conceive of the suit.

Id. at 617 (Kennedy, J., dissenting).[12] If the Court reverses the decision of the Tenth Circuit here, the dynamic will be far more troubling than in *Jerman*. As discussed above, thousands of licensed attorneys will be unable to conduct lawful foreclosures on behalf their clients without being put at risk of violating federal law. NCBA urges the Court to affirm.

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[12] The *Jerman* dissent cited *Federal Home Loan Mortgage Corp. v. Lamar*, in which the Sixth Circuit described the "cottage industry" of litigation that has arisen out of consumers and their attorneys suing under the FDCPA based on technical violations of the statute. *See* 503 F.3d 504, 513 (6th Cir. 2007). Not surprisingly, the *Lamar* case stems from an attorney's attempt to carry out a foreclosure for its lender client. *Id.* at 506-07.

CONCLUSION

For all of the foregoing reasons, the NCBA respectfully submits that the decision of the Tenth Circuit should be affirmed.

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Respectfully submitted,

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